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Supreme Court, U.S.
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No. 90-1696

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARK LESTER,

Petitioner,

v

GENE BORGERT, Warden
Cotton Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I

DOES THE COURT HAVE JURISDICTION OVER THIS PETITION FOR CERTIORARI WHERE PETITIONER DID NOT OBTAIN A CERTIFICATE OF PROBABLE CAUSE?

II

DID THE DISTRICT COURT AND COURT OF APPEALS PROPERLY DENY A CERTIFICATE OF PROBABLE CAUSE?

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JURISDICTION

Respondent disputes that this Court has jurisdiction to review a petition for writ of certiorari as argued in the REASONS FOR DENYING THE WRIT.

STATEMENT OF THE CASE

Petitioner, Clark Lester, was jury convicted of first degree murder on July 10, 1968, in the Washtenaw County Circuit Court, contrary to Mich. Comp. Laws 750.316; MSA 28.548. On July 19, 1968, he was sentenced to mandatory life imprisonment.

On December 6, 1973, the Michigan Court of Appeals affirmed Petitioner's conviction in a published opinion. People v Lester, 50 Mich App 725 (1973), reh den, January 22, 1974.

On June 28, 1974, Petitioner, through appellate counsel, filed a delayed appli-

cation for leave to appeal in the Michigan Supreme Court. Leave to appeal in the Michigan Supreme Court was denied August 28, 1974. People v Lester, 392 Mich 791 (1974).

Petitioner subsequently filed several motions for new trial in the trial court in 1976 and June 1984, and sought leave to appeal in the state appellate courts. No leave to appeal was granted. See Court of Appeals No. 81987, Michigan Supreme Court No. 76303.

On August 11, 1989, Petitioner, through retained counsel, filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of Michigan, Southern Division, Docket No. 89-CV-72420-DT. He raised three grounds for habeas relief claiming:

1) that the trial judge unconstitutionally shifted the burden of proof to him by instructing the jury that certain elements of the crime were presumed or implied by law; 2) that the trial judge's instructions on premeditation shifted the burden of proof to him; and 3) ineffective assistance of counsel. This petition was subsequently amended and the latter claim of ineffective assistance of counsel was deleted as unexhausted.

On September 30, 1990, Magistrate Paul J. Komives recommended denial of the writ principally on the ground that the rule of Sandstrom v Montana, 422 US 510 (1979), was not retroactively applicable to Petitioner's 1968 conviction on collateral review under this Court's holding in Teague v Lane, 489 US 288 (1989).

Magistrate's Report and Recommendation, at 4-5, Docket No. 89-CV-72420-DT.

Petitioner, through his same counsel, filed objections to the Magistrate's Report and Recommendation in that he quarreled with the Magistrate's application of the rule of Teague, supra.

On October 12, 1990, the District Court Judge, the Honorable Horace W. Gilmore, adopted the Magistrate's Report and Recommendation and denied the petition for a writ of habeas corpus in a Memorandum Opinion and Order, Docket No. 90-2420.

On November 12, 1990, Petitioner's counsel filed a notice of appeal and a motion for a certificate of probable cause. Judge Gilmore denied the latter by order dated November 19, 1990.

On November 23, 1990, Petitioner's counsel sought a certificate of probable cause in the United States Court of Appeals for the Sixth Circuit, which court denied the motion on January 25, 1991.

In this habeas corpus proceeding, Petitioner asserts that his constitutional rights were violated when the trial court gave certain jury instructions.

The killing leading up to Petitioner's conviction occurred on Thursday, February 22, 1968, when shortly after 9:00 p.m. Petitioner shot Robert Ray in the chest following a narrowly averted automobile collision at a traffic light in the City of Ypsilanti, Michigan.

John Larry Slone testified that he traveled to work with Petitioner and Irving Lester at about 2:50 p.m. on the day in question. Irving Lester was driving Jacky Slone's car. Trial Transcript, 156-158 (hereafter T). Later in the evening, Slone told his foreman that he felt sick and wanted to go home. Id. 158. After he punched out, he went over to Petitioner's work division and told Petitioner that he was leaving. Petitioner said that he would leave work too. T 158-159. Petitioner told him to get his (Petitioner's) car keys from Jacky Slone and to drive the car around to the exit gate. T 159-160. Petitioner met him there, got into his car and drove down Huron Street. At a red traffic light a car (1962 Ford) pulled partway into their lane in order to make a turn.

This caused Petitioner to swerve in order to avoid it. T 161. The driver of the other car gave Petitioner the "finger". Id. 161-162. Slone noticed that there were two other persons in the other car. Id. 162.

Petitioner turned his car around and followed the Ford which completed its turn at the light change. T 162. As Petitioner followed the Ford along Adams Street, he pulled a gun out from under his car seat. T 163, 182. Petitioner told Slone to roll his window down. Id. 163. When they were level with the Ford, the driver, who was getting out of his car, asked Petitioner what was the matter, what could he do for him. Petitioner said twice that "he could solve his problem for him right fast." T 163,

185. Petitioner then shot the other driver, Robert Ray, holding the gun at arm's length. T 164, 183. He saw the driver fall backwards. Petitioner drove off. Id. 163. John Slone recalled that just before Petitioner shot Ray, he told him (Slone) to lean forward in his car seat. He leaned forward almost to the dashboard and Petitioner fired the gun past him. T 164, 184-185.

The trial court instructed the jury on the elements of first degree murder, including the elements of intent, premeditation, and malice, to which no objections were made. T 414-415. Nor was an objection made when the trial court reinstructed the jury with respect to premeditation and possible verdicts. T 417.

REASONS FOR DENYING THE WRIT

PETITIONER HAS INCORRECTLY INVOKED THE COURT'S JURISDICTION UNDER 28 USC § 1254 BECAUSE NO CERTIFICATE OF PROBABLE CAUSE WAS GRANTED.

The chief requirement involved in invoking the United States Supreme Court's certiorari jurisdiction under 28 USC § 1241 is well established. This petition does not discuss jurisdiction even though it is a threshold question under the instant procedural circumstances. Furthermore, the decision of the District Court and the Court of Appeals to deny Petitioner a certificate of probable cause is consistent with the legal principles set forth in Barefoot v Estelle, 463 US 880, 892-893 (1983).

A. THIS COURT HAS NO JURISDICTION TO CONSIDER THIS PETITION FOR A WRIT OF CERTIORARI.

Petitioner is a state prisoner whose habeas petition was dismissed by the Federal District Court Judge and who was denied a certificate of probable cause by the Federal Judge and the Sixth Circuit Court of Appeals. In his jurisdictional statement, appellate counsel for Petitioner cites 28 USC § 1254(1). Section 1254(1) grants plenary jurisdiction to the Supreme Court:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ..."

Definition of "cases in the courts of appeals" does not extend to those where

the lower courts have not extended a certificate of probable cause. House v Mayo, 324 US 42, 44 (1945). More recently in Davis v Jacobs, 454 US 911, 912 (1981), the Supreme Court denied seventeen (17) petitions for writs of certiorari because the courts below had not issued certificates of probable cause explaining that:

> "Because none of the petitioners obtained a certificate of probable cause, none of these cases was properly 'in' the Court of Appeals and therefore 28 USC § 1254 [28 USCS § 1254] does not give this Court jurisdiction over the petitions for writs of certiorari."

Recent Supreme Court cases such as Davis, have focused discussions not on whether the Court has jurisdiction, there being no dispute that it does not, but on whether such defective petitions should be denied or dismissed. In Jeffries v

Barksdale, 453 US 914, 915 (1981), the dissenting opinion, in support of its position that such cases should be dismissed, observed that both Congressional enactment and court rule mandated a certificate of probable cause from the District Court as an "indispensible prerequisite" to an appeal in the Court of Appeals. See 28 USC § 2253 and Fed. Rule App. Proc. 22(b). The dissent concluded that:

> "[O]ur certiorari jurisdiction, however, extends only to '(c)ases in the courts of appeals.' 28 USC § 1254 [28 USCS § 1254]. Since there was no certificate of probable cause in this case, it was never 'in' the Court of Appeals. In the plain words of the statute, '(a)n appeal may not be taken to the court of appeals.' Since the case was never in the Court of Appeals we cannot review it by way of writ of certiorari to that court." 453 US at 914.

It is readily apparent that Petitioner has incorrectly invoked this

Court's jurisdiction under 28 USC § 1254 because no certificate of probable cause issued from the court below.

B. THE DISTRICT COURT AND COURT OF APPEALS PROPERLY DENIED PETITIONER A CERTIFICATE OF PROBABLE CAUSE.

Even if this Court were to exercise its surrogate authority, as noted in Davis, 454 US at 913, review would be functionally limited to the action of the Court of Appeals "in declining to allow an appeal to it." 28 USC § 1651.

In this habeas corpus proceeding, Petitioner was required to obtain a certificate of probable cause from the District Court or from a Court of Appeals judge. The request for a certificate or probable cause is based upon 28 USC § 2253 and Rule 22(b) of the Rules of

Appellate Procedure. Section 2253 provides that:

> "§ 2253. Appeal
>
> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

Congress established the requirement of a certificate of probable cause in

order to prevent frivolous appeals. The Supreme Court agreed in 1983 with the weight of authority in the Courts of Appeal which held that a certificate of probable cause should be granted where petitioner makes a "substantial showing of the denial of a federal right." Barefoot v Estelle, 463 US 880, 893 (1983) (and cases cited therein). In its discussion, the Court quoted language from a Second Circuit case on point, stating that this language "cogently sums up this standard":

> "In requiring a question of some substance, or a substance showing of the denial of [a] federal right, obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further."

Id. at n 4 (quoting Jones v Richmond, 245 F2d 234 (2d Cir, 1957), and Gordon v Willis, 516 F Supp 911 (ND Ga, 1980).

A motion for certificate of probable cause is addressed to the sound discretion of the district court; issuance is not a matter of right, and may be denied where it appears that the appeal is without substantial merit. Wilks v Young, 586 F Supp 413 (ED Wisc, 1984). Courts, in considering whether to issue a certificate of probable cause, should resolve doubts in favor of the petitioner. McKoy v Wainwright, 630 F Supp 122 (SD Fla, 1986). When the district court concludes that denial of the certificate is proper, it must state the reasons for its denial. Wilks v Young, 586 F Supp at 415.

The District Court below adopted the Magistrate's Report and Recommendation that the challenged jury instruction was distinguishable from that given in Sandstrom v Montana, 442 US 510, 513 (1979), which Petitioner relied upon, and stated its reasons why. Additionally, the District Court found that Petitioner was not entitled to habeas relief under the rule announced in Teague v Lane, 489 US 288 (1989). The "(a)pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system", 489 US at 309. The plurality in Teague held: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be

applicable to those cases which have become final before the new rules are announced." Id. at 310. A majority of the Court in Penry v Lynaugh, 492 US ___; 109 S Ct 2954 (1989), embraced the plurality view. The rule was applied to both capital and non-capital cases in Saffle v Parks, 494 US ____; 110 S Ct 1257, 1258-59 (1990). The District Court further found that the two exceptions to the Teague rule did not apply to Petitioner's case. Memorandum Opinion and Order, at 1-2. District Court Docket No. 89-2420. Finally, the District Court found no showing of the denial of a federal right regarding a challenged jury instruction on premeditation.

The Court of Appeals denied a certificate of probable cause after giving the

case sufficient consideration to conclude that the holdings of the District Court were correct. In addition, the Court of Appeals pointed out, as a matter of academic argument only, that even if the challenged intent instruction did violate the rule of Sandstrom and even if the Sandstrom rule did apply retroactively, the error would be harmless under prevailing law, [Cook v Foltz, 814 F2d 1109, 1112-13 (6th Cir), cert den, 484 US 837 (1987)], because intent was not at issue in Petitioner's case. Given that retroactivity is a threshold question, Teague, 489 US at 300, the denials of a certificate of probable cause were clearly appropriate.

CONCLUSION

The Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,

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